

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NUMBER: 59025 / 2011

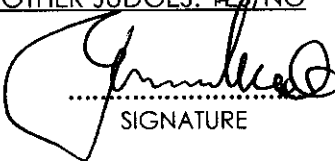
DATE OF HEARING: 15 OCTOBER 2016

DATE OF JUDGMENT: 19 OCTOBER 2016

In the matter between:

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

19-10-2016
DATE


SIGNATURE

ZANELE SIBEKO

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

THE REGISTERING OFFICER: HOME AFFAIRS JHB

Second Respondent

NKULULEKO QAMBA

Third Respondent

Nominee Executor in the estate late Mabaso

THE MASTER OF THE HIGH COURT JHB

Fourth Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION

[1] This is an application by the third respondent for the dismissal of the application brought by the applicant in the main application. The applicant brought an application where she moved for an order:

[a] that it be declared that she is the lawful customary wife of the later Mr Joshua Mabaso;

[b] directing that the second respondent register such customary marriage;

[c] that the third respondent be interdicted to administering or dealing with the with the distribution of the assets of the deceased estate;

[d] that the forth respondent be directed to appoint the applicant as executrix in the said deceased estate;

[e] that anyone opposing the application be ordered to pay the costs of the application.

[2] There were several delays in prosecuting the main application leading up to this application wherein the third respondent has moved for an order dismissing the main application with costs.

BACKGROUND

- [3] The main application was launched on 13 October 2011. The third respondent filed his notice of his intention to oppose on 31 October 2011 followed by his answering affidavit on 25 November 2011.
- [4] In dealing with the allegations contained in the founding affidavit, *inter alia*, the denial of the customary marriage, several points *in limine* were raised, more importantly the non-compliance with the provisions of section 4 of the Recognition of Customary Marriages Act 120 of 1998.
- [5] The application to dismiss the main application was set down several times and each time removed to accommodate the applicant in one or other manner, including joining additional respondents. No joinder application ensued. Over the period 2011 to 2012 there were several letters written to and fro.
- [6] The third respondent submitted that the main application was ripe for hearing since 2012 but the applicant has failed to take any steps to prosecute the application.
- [7] The third respondent was however entitled to set the main application down for hearing provided that the requirements of the practice directive had been adhered to.

- [8] The third respondent did not make any submissions in this regard and I accept that the third respondent may have contributed to the delay by not setting the main application down for hearing.
- [9] The applicant is alleged to have indicated in terms of rule 6 that certain disputes in the main application were referred to oral evidence. The third respondent submitted that the applicant herself was entitled to do so in terms of provisions of rule 6. I can find no such provisions in rule 6 save that the court may, on hearing disputes of fact, refer such disputes to oral evidence.
- [10] Be this as it may, it is common cause on the papers and between counsel appearing for the parties, that the applicant has still not approached the registering officer with the request to register the marriage. This, the third respondent submitted, vitiates any application to court. I am inclined to agree.
- [11] I am of the view that the applicant must first have approached the registering officer and if such officer refuses to register the marriage the applicant could then approach the court. This is in respect of the main application.
- [12] Turning to the application before me the requirements for dismissing court proceedings for want of prosecution thereof were canvassed in *Cassimjee v Minister of Finance* 2014 (3) SA 198 (SCA) wherein such requirements were identified as follows:
- [12.1] there must be a lengthy delay;

[12.2] the delay must be inexcusable;

[12.3] there must be serious prejudice to the other party.

[13] The applicant has not, in my view, set out any circumstances to justify the lengthy delay or to show that there is some excuse for the delay. Instead she embarked on criticism of the third respondent who has disputed the validity of the customary marriage.

[14] Moreover, the fact that the registering officer has not been approached is fatal to the main application. Previous cost orders against the applicant arising from postponements have not been paid.

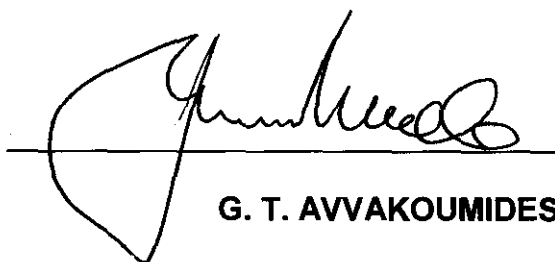
[15] There can be no doubt that the deceased estate has been prejudiced by the long delay. In turn the beneficiaries of the late Mabaso are also being prejudiced. The fate that befalls the main application does not culminate in the doors of the court being closed on her.

[16] The applicant is entitled to approach the registering officer to register the customary marriage. If the marriage is so registered, the third respondent is obliged to take cognisance thereof and that is the end of the matter.

[17] If the registering officer declines to register the marriage, such decision may be taken on review on grounds that may be shown. The applicant may then be guided by her legal team to take cognisance of the allegations contained in the answering affidavit to the main application and to deal with the obvious

disputes contained therein. Under the circumstances, I am inclined to grant the order sought by the third respondent to dismiss the main application. I have exercised my discretion under the prevailing circumstances and refrain from making any cost order. I make the following order.

[17.1] The main application is dismissed.

A handwritten signature in black ink, appearing to read 'G. T. Avvakoumides', is written over a horizontal line.

G. T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE: 19 OCTOBER 2016

Representation for Applicant:

Counsel: S. Kanyangarara

Instructed by: Kekana Attorneys

Representation for the Third Respondent:

Counsel: M Skhosana

Instructed by: Malebye Motaung Mtembu